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Nos. 96-552 & 96-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,

Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The *amici* are national organizations that represent the American Orthodox Jewish community. We have consistently supported the principle of fair and even-handed

treatment for children who attend religious schools and for the parents who are obligated, for reasons of conscience, to enroll their children in such schools. The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs on behalf of these children and parents in numerous cases considered by this Court, including *Board of Education v. Allen*, 392 U.S. 236 (1968); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and, of course, *Aguilar v. Felton*, 473 U.S. 402 (1985).

The individual organizations represented by COLPA in this case are:

(1) Agudas Harabbonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

(2) Agudath Israel of America is a national Orthodox Jewish public interest organization with chapters in numerous Jewish communities throughout the United States and Canada. It is dedicated to advancing Jewish social, religious and educational concerns.

(3) National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

(4) The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400

members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

(5) The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply involved in issues related to religious freedom.

(6) Torah Umesorah-National Society of Hebrew Day Schools is the coordinating body for more than 600 Jewish Day Schools across the United States.

(7) The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America with over one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

When this case was last before this Court, in the 1984 Term, COLPA filed separate *amicus curiae* briefs in the case and in *Grand Rapids School Dist. v. Ball*, No. 83-990, decided at 473 U.S. 373 (1985). Our interest at that time was similar to our interest now, but the actual experience of more than a decade has proved that our dire predictions regarding the effect of an affirmance in the 1984-85 cases were accurate. This Court is now reconsidering *Aguilar*, and we hope it will, at the same time, reconsider and overrule *Ball*.

We said in our initial *Aguilar* brief (Brief for COLPA as *Amicus Curiae*, Nos. 84-237 and 84-238, p. 3):

> This case is of direct concern to the Orthodox Jewish community because the decision below wipes out a federally financed program that has assisted thousands of educationally disadvantaged Jewish children residing in low-income neighborhoods by providing for them remedial reading and remedial mathematical programs (taught predominantly by non-Jewish teachers, responsible only to their secular supervisors in the public-school system) merely because these remedial classes are given in the same buildings where the children receive their religious teaching.

This Court's affirmance of the Second Circuit's decision in *Aguilar* had the damaging effect we described. As detailed in an August 1993 study by the U.S. Department of Education, *Chapter 1 Services to Private Religious School Students: A Supplemental Volume to the National Assessment of the Chapter 1 Program*, the decision in *Aguilar* resulted in a considerable decline in the number of non-public school students participating in the program. The students who do participate in the program are serviced with "delivery machanisms" that are academically and socially unsatisfactory. And the expenses necessary to implement the alternate forms of service delivery are staggering.

The disastrous fallout from *Aguilar* has in addition extended beyond the Title I context in which the case arose. The most dramatic effect was, of course, in the Village of Kiryas Joel, where a substantial number of severely handicapped children of members of the Satmar Hasidic Community were deprived of all remedial programs because the local school authorities in Monroe, New York, refused to utilize "neutral sites" within the village. Extended state-court litigation produced a stand-off, and the New York

Legislature created a separate public-school district for the Village of Kiryas Joel. The constitutionality of that district was challenged, and the challenge resulted in this Court's ruling in *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994). Had *Aguilar v. Felton* not been governing constitutional law, there would have been no need for the New York legislation that this Court invalidated in that case. The learning-disabled children of Kiryas Joel would have received their remedial programs from public school teachers in the religious school buildings.

The *Kiryas Joel* case, and several others that have arisen in the post-*Aguilar* era (*see, e.g., Parents' Association of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986)), point to one of the most tragic ironies of the *Aguilar* decision: It has engendered precisely the type of "political divisiveness along religious lines" that Justice Brennan's majority opinion (473 U.S. at 414) claimed it was designed to avoid. *See also* Justice Powell's concurring opinion in *Aguilar*, 473 U.S. at 416. So long as *Aguilar* remains the law of the land, local education officials will struggle to balance competing requirements of providing religious school children with equitable Title 1 services within reasonable budgetary constraints while avoiding anything that might cross the line into forbidden establishment of religion. As a result, conflict is likely to arise again and again.

The Orthodox Jewish children attending Jewish religious day schools need the assistance that Title I can provide to them. Its benefits are directed at needy children, and its purpose is to make them productive American citizens. A decade of damage to school children is enough. We urge the Court expeditiously to overrule *Aguilar* and once again enable New York's public school personnel, under the authority of public school administrators, to enter

religious schools and help severely and moderately learning-disabled children adjust to American society.

ARGUMENT

I

STARE DECISIS SHOULD PLAY NO ROLE WHATEVER IN DECIDING THE CONSTITUTIONALITY OF TITLE I PROGRAMS IN RELIGIOUS SCHOOLS LOCATED IN NEW YORK

The Court's 5-to-4 decision issued in 1985 invalidating the application of New York's Title I program to religious schools should not present any barrier whatever to a plenary reconsideration of the constitutional issues. This Court said in *Payne v. Tennessee*, 501 U.S. 808 (1991), that notwithstanding the usual desirability of adhering to precedent, *stare decisis* should not govern constitutional cases because "correction through legislative action is practically impossible." 501 U.S. at 828, quoting Justice Brandeis, dissenting, in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932). The Court in *Payne* noted that it had overruled 33 constitutional decisions in the 20 Terms between 1970 and 1990. See 501 U.S. at 828-29, n. 1.

Overruling, said the Court, is particularly appropriate where the overruled holdings were "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." 501 U.S. at 828-29. Another standard is whether the decisions being overruled "are unworkable or are badly reasoned." 501 U.S. at 827. These criteria are satisfied in the present case. *Aguilar* produced a concurrence by Justice Powell (who was the fifth vote in the majority) and "spirited" dissents from Chief

Justice Burger (473 U.S. at 419), then-Associate Justice Rehnquist (473 U.S. at 420), Justice White (473 U.S. at 400), and Justice O'Connor (473 U.S. at 421). All the dissenters bemoaned the harmful consequences of the decision. Chief Justice Burger decried the decision as one that exhibits "paranoia" and "hostility toward religion." 473 U.S. at 419, 420. Justice White called the result "contrary to the long-range interests of the country." 473 U.S. at 400. Justice Rehnquist said the majority was "rely[ing] on gossamer abstractions to invalidate a law" that, in his words, provided "sorely needed assistance." 473 U.S. at 421. And Justice O'Connor called the decision "tragic" because it deprives children "of a program that offers a meaningful chance at success in life." 473 U.S. at 431. Even the late Judge Henry J. Friendly, whose Second Circuit opinion was affirmed, said that the Title I program in New York's religious schools "has done so much good and little, if any, detectible harm." 739 F.2d 48, 72 (2d Cir. 1984). *Aguilar* was unworkable, badly reasoned, decided by a majority of one, and subjected to severe criticism from the day it was issued. It deserves no respect at all. *See also Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1127 (1996).

II

THE "ENTANGLEMENT" PREMISE OF *AGUILAR* HAS BEEN REJECTED BY LATER CASES

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), this Court upheld the facial constitutionality of a federal funding program that enabled religious organizations to carry out secular objectives. The Court recognized that individual implementation of the funding program might result in impermissible governmental sponsorship of religious indoctrination. Nonetheless, the Court held that the

inclusion in the law of a policing mechanism whereby the Secretary of Health and Human Services may insure that funds are not used for the teaching of religious doctrine sufficed to overcome the constitutional difficulty.

The Court rejected the argument -- which prevailed in *Aguilar* — that the policing necessitated "excessive government entanglement with religion" in violation of the third prong of the test of *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). The Court noted that "the 'entanglement' prong of the *Lemon* test has been much criticized over the years." 487 U.S. at 616. While *Bowen v. Kendrick* purported to distinguish *Aguilar*, it effectively overruled the reasoning of that decision.

Subsequent decisions by the Court have also undermined the reasoning of *Aguilar*. In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995), this Court required a state university to provide equal funding for student speech expressed from a religious perspective as for secular student speech. Notwithstanding the possibility that funding might thereby be used for religious indoctrination, the Court did not invoke the *Aguilar* rationale and declare the funding impermissible on potential "entanglement" grounds. Nor did the Court see an "entanglement" problem in the federal funding of a sign-language interpreter who was attending classes with a student at a Roman Catholic high school. *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993). The Court said in *Zobrest* (509 U.S. at 10) that it is constitutionally permissible for government to offer

> a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion."

That description fits New York's Title I program that was invalidated in *Aguilar*. Under decisions of the Court that were rendered after *Aguilar*, including *Bowen v. Kendrick, Rosenberger, Zobrest, and Witters v. Washington Dep't of Service for Blind*, 474 U.S. 481 (1986), the secular aid provided to schoolchildren enrolled in sectarian schools under Title I now passes constitutional muster. It should be renewed with an overruling of *Aguilar*.

In *Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994), three Justices of the Court expressed the view that *Aguilar* "should be overruled at the earliest opportunity." 512 U.S. at 750 (Scalia, J., dissenting, joined by the Chief Justice and Justice Thomas). Two other Justices said they thought it appropriate to "reconsider" *Aguilar*. 512 U.S. at 717 (O'Connor, J.), 731 (Kennedy, J.).

We conclude this brief with a reiteration of the concluding observations in our *amicus* brief in *Grand Rapids School District v. Ball*, No. 83-990, p. 6:

> We refuse to believe that the First Amendment to the United States Constitution, which was designed as a bulwark of religious liberty and a means of guaranteeing religious freedom in this Nation, prohibits public school authorities from utilizing the only effective means of delivering remedial and enrichment classes to the thousands of children who are receiving combined secular and religious educations because their parents have deep and abiding religious convictions. A Jewish parent who believes that it is an essential principle of his or her religious faith to teach the principles of Judaism diligently to

his or her children (*Deuteronomy* VI: 7) is not only asked, under this constitutional doctrine, to pay for the child's religious instruction and for the core secular program that is required for promotion and graduation under State law, but is also asked to relinquish all practical access to supplemental programs that public-school authorities are prepared to provide, *under their exclusive guidance and control*, on the premises of a private school. The Constitution does not, we submit, require this "cruel choice." See *Braunfeld v. Brown*, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting); *see also Widmar v. Vincent*, 454 U.S. 263 (1981). The result of the ruling below is, at the least, the kind of "callous indifference" to religious believers which this Court has said "was never intended by the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed. *Aguilar v. Felton* should be overruled.

Respectfully submitted,

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